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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/700,761	11/04/2003	James D. Carper	100-00222	6335
26753 7590 10/29/2009 ANDRUS, SCEALES, STARKE & SAWALL, LLP 100 EAST WISCONSIN AVENUE, SUITE 1100 MILWAUKEE, WI 53202				
EXAMINER				
MATZEK, MATTHEW D				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
10/29/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/700,761

Applicant(s)

CARPER ET AL.

Examiner

MATTHEW D. MATZEK

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 August 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3, 5-11 and 67-74 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3, 5-11 and 67-74 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11/4/2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/06)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 8/14/2009 has been entered.

Response to Amendment

2. The amendment dated 8/14/2009 has been fully considered and entered into the Record. Claim 1 has been amended to now recite first and second layers consisting essentially of a thermoplastic polymer selected from the group consisting of a polyolefin, an acrylic modified polyolefin, a vinyl acetate modified polyolefin and an acrylic polymer. The previously applied art fails to provide for this new limitation resulting in the previous rejection being withdrawn. Claims 1-3, 5-11 and 67-74 are currently active.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1, 2, 5-9, 67 and 71-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shirrell et al. (US 6,942,909 B2).

a. Shirrell et al. disclose a cling film system that includes first and second film plies (abstract). The cling film is flexible in that it may be used to wrap steel coils and other articles (col. 1, lines 5-8). The first ply **20** comprises a first cling film **25** and a first base layer **23**. The second ply **30** comprises a second cling film **33** and a second base layer **35** (Figure 2). The cling layers have outer auto-adhesive surfaces such that when they engage each other they form a peelable and refastenable cling-to-cling interface (col. 3, line 44-col. 4, line 61). The first and second cling layers may consist essentially of a polyolefin, an acrylic modified polyolefin, a vinyl acetate modified polyolefin and an acrylic polymer (col. 4, lines 28-61). The first and second cling layers may be made of the same material (col. 4, lines 62-68), which allows for a peel strength of at least 100 grams/inch (col. 3, lines 42-53).

b. The core layers of Shirrell et al. and the base layers of the instant application serve to provide structural integrity to the cling films. Shirrell et al. teach the use of Applicant's preferred materials, high density polyethylene and propylene (col. 5, lines 4-29), in formation of the core/base layers of the cling film. It is well known that the density of a polyethylene material is related to the crystallinity of the material. The higher the density, the more crystalline. The

more crystalline a polymer is the less elastic it is and the less give it will have. Therefore, increasing the density/crystallinity would contribute to raising the modulus of elasticity (resistance to stretching). Shirrell et al. fail to explicitly teach the base layers are non-stretchable, however.

c. As previously stated, both the applicants and Shirrell et al. high density polyethylene materials. It would have been obvious to one having ordinary skill in the art to have used higher density materials in the core layer of Shirrell et al. to make a more crystalline film wherein the structure would have a higher modulus of elasticity and been "non-stretchable".

d. Although Shirrell et al. do not explicitly teach the claimed feature of a shear strength of greater than 4 hours nor do they teach how the shear or peel strengths are to be measured, it is reasonable to presume that said property is inherent to the invention of Shirrell et al. Support for said presumption is found in the use of like materials (i.e. auto-adhesive polyolefin films that meet the claimed peel strength). The burden is upon Applicant to prove otherwise. *In re Fitzgerald* 205 USPQ 594. In addition, the presently claimed property of shear strength of greater than 4 hours via the claimed method of measure would obviously have been present one the Shirrell et al. product is provided. Note *In re Best*, 195 USPQ at 433, footnote (CCPA 1977) as to the providing of this rejection made above under 35 USC 102. Reliance upon inherency is not improper even though rejection is based on Section 103 instead of Section 102. *In re Skoner*, et al. (CCPA) 186 USPQ 80.

e. Claims 2 and 67 are rejected as the base layers may be made of high-density polyethylene (col. 5, lines 4-29).

f. Claims 5, 6 and 8 are rejected as claimed polymers and copolymers may be used to form the cling layer of the composite article (col. 4, lines 28-55).

Claim 9 is rejected as it is reasonable to assume that the high density films of Shirrell et al. are substantially non-stretchable, meaning the laminate stretches less than about 50% from its original non-stretched configuration.

4. Claims 3, 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shirrell et al. (US 6,942,909 B2) as applied to claim 1 above, and further in view of Tuman et al. (US 2001/0018110 A1). Shirrell et al. are silent as to the use of a breathable, nonwoven base layer.

a. Tuman et al. teach the creation of a breathable web material that may serve as a refastenable article (abstract). The breathable refastening system may be used in diapers [0041]. The web of Tuman et al. is capable of adhering to itself (i.e. auto-adhesive) [0054] around another object. The base material upon which the fastening system is conjoined may be an inelastic nonwoven web [0060].

b. Shirrell et al. and Tuman et al. are from the same field of endeavor (i.e. auto-adhesive fasteners).

c. It would have been obvious at the time the invention was made to a person having ordinary skill in the art to modify the base layer of Shirrell et al. with the breathable and nonwoven substrate motivated by the desire to create a breathable article as disclosed by Tuman et al.

5. Claims 68 and 69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shirrell et al. (US 6,942,909 B2) as applied to claim 2 above, and further in view of Mascarenhas et al. (US 5,888,615). Shirrell et al. fail to teach the use of nylon or acrylic polymer for use as the base layers.

a. Mascarenhas et al. disclose an ink-imprinted and reusable multilayer cling film (abstract) formed without the use of an adhesive material (col. 1, lines 4-11).

b. Shirrell et al. disclose the claimed invention except that they use polyethylene instead of nylon or polyethylene methacrylic acid for the base layer, Mascarenhas et al. shows polyethylene, nylon and polyethylene methacrylic acid are functional equivalent film materials known in the art of cling films (col. 11, lines 24-40). Therefore, because these polymers were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute nylon or polyethylene methacrylic acid for polyethylene.

6. Claim 70 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shirrell et al. (US 6,942,909 B2) as applied to claim 2 above, and further in view of Velazquez et al. (US 5,614,297). Shirrell et al. fail to teach the use of poly(vinyl chloride) for use as the base layers

a. Velazquez et al. disclose polyolefin blown mono- and multi-layer stretch films for use as protective wrap for food. The applied reference also teaches that poly(vinyl chloride) [PVC] films have enjoyed great commercial success in both non-food and food contact applications (col. 1, lines 1-68).

Art Unit: 1794

b. Shirrell et al. disclose the claimed invention except that they teach that it is known to use polyolefin instead of PVC to make the base layer, Velazquez et al. shows that polyolefins and PVC are functional equivalent film materials known in the art of cling films (col. 1, lines 11-15). Therefore, because these two polymers were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute PVC for polyolefin.

Comment [THM1]:

Stop cutting and pasting. Wrong ref cited. Also, is the showing of equivalents for accomplishing the same goal as the primary ref?

Double Patenting

7. Claims 1, 2, 5-9, 11 and 71-74 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 48, 59-63, 69, 70, 74, 75, 77-80 and 88-90 of copending Application No. 10/981,046 in view of Shirrell et al. (US 6,942,909 B2). The composition of the applied application is the same as that which is instantly claimed, but the application fails to teach the use of a second auto-adhesive layer or the article's peel strength. Shirrell et al. disclose a cling film system that includes first and second film plies (abstract). The cling film is flexible

in that it may be used to wrap steel coils and other articles (col. 1, lines 5-8). The first ply **20** comprises a first cling film **25** and a first base layer **23**. The second ply **30** comprises a second cling film **33** and a second base layer **35** (Figure 2). The cling layers have outer autoadhesive surfaces such that when they engage each other they form a peelable and refastenable cling-to-cling interface (col. 3, line 44-col. 4, line 61). The first and second cling layers may consist essentially of a polyolefin, an acrylic modified polyolefin, a vinyl acetate modified polyolefin and an acrylic polymer (col. 4, lines 28-61). The first and second cling layers may be made of the same material (col. 4, lines 62-68), which allows for a peel strength of at least 100 grams/inch (col. 3, lines 42-53). It would have been obvious to one of ordinary skill in the art to have made the laminate structure of '046 with a duplicate ply so that the two cling layers may refastenably bond to one another without the need for adhesives. It also would have been obvious to have substituted the polymers used to make the cling layer in Shirrell et al. for those of '046 as Shirrell et al. has demonstrated that they are art recognized functional equivalents.

This is a provisional obviousness-type double patenting rejection.

8. Claims 1, 2, 5-10 and 67-74 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 48-90 of copending Application No. 10/867,438 in view of Shirrell et al. (US 6,942,909 B2). The composition of the applied application is the same as that which is instantly claimed, but the application fails to teach the use of a second auto-adhesive layer or the article's peel strength. Shirrell et al. disclose a cling film system that includes first and second film plies (abstract). The cling film is flexible in that it may be used to wrap steel coils and other articles (col. 1, lines 5-8). The first ply **20** comprises a first cling film **25** and a

first base layer 23. The second ply 30 comprises a second cling film 33 and a second base layer 35 (Figure 2). The cling layers have outer autoadhesive surfaces such that when they engage each other they form a peelable and refastenable cling-to-cling interface (col. 3, line 44-col. 4, line 61). The first and second cling layers may consist essentially of a polyolefin, an acrylic modified polyolefin, a vinyl acetate modified polyolefin and an acrylic polymer (col. 4, lines 28-61). The first and second cling layers may be made of the same material (col. 4, lines 62-68), which allows for a peel strength of at least 100 grams/inch (col. 3, lines 42-53). It would have been obvious to one of ordinary skill in the art to have made the laminate structure of '438 with a duplicate ply so that the two cling layers may refastenably bond to one another without the need for adhesives. It also would have been obvious to have substituted the polymers used to make the cling layer in Shirrell et al. for those of '438 as Shirrell et al. has demonstrated that they are art recognized functional equivalents.

This is a provisional obviousness-type double patenting rejection.

Response to Arguments

9. Applicant's arguments with respect to claims 1-3, 5-11 and 67-74 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MATTHEW D. MATZEK whose telephone number is (571)272-2423. The examiner can normally be reached on M-F, 9-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Tarazano can be reached on 571.272.1515. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Matthew D Matzek/
Examiner, Art Unit 1794